

1 BRAD D. BRIAN (CA Bar No. 079001, *pro hac vice*)

Brad.Brian@mto.com

2 LUIS LI (CA Bar No. 156081, *pro hac vice*)

Luis.Li@mto.com

3 TRUC T. DO (CA Bar No. 191845, *pro hac vice*)

Truc.Do@mto.com

4 MIRIAM L. SEIFTER (CA Bar No. 269589, *pro hac vice*)

Miriam.Seifter@mto.com

5 MUNGER, TOLLES & OLSON LLP

355 South Grand Avenue, Thirty-Fifth Floor

6 Los Angeles, CA 90071-1560

Telephone: (213) 683-9100

7 THOMAS K. KELLY (AZ Bar No. 012025)

8 tskelly@kellydefense.com

425 E. Gurley

9 Prescott, Arizona 86301

Telephone: (928) 445-5484

10 Attorneys for Defendant JAMES ARTHUR RAY

11  
12 SUPERIOR COURT OF STATE OF ARIZONA  
13 COUNTY OF YAVAPAI

14 STATE OF ARIZONA,

15 Plaintiff,

16 vs.

17 JAMES ARTHUR RAY,

18 Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S  
MOTION TO STRIKE AGGRAVATING  
CIRCUMSTANCES AND PRECLUDE  
ADDITIONAL AGGRAVATING  
CIRCUMSTANCES**

SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

2011 NOV -3 PM 4:25 ✓

SANDRA R. CAMACHO, CLERK

BY: Kelly Gresham

1     **I.     INTRODUCTION**

2             When the Defense objected at the aggravation hearing to the playing of an audio recording  
3 that had not been admitted at trial, the Court cautioned the State with two alternatives:

4                     “THE COURT: If it’s admitted at trial, then it’s admitted. *If it’s not*  
5                     *admitted, then it’s right into a mistrial.*”

6             *See* Trial Transcript, 6/29111, at 14:23-25 (emphasis added). The Court’s comment was well-  
7 founded. “When extraneous information reaches a jury, a defendant is entitled to a new trial  
8 unless the appellate court can determine beyond a reasonable doubt that the extraneous  
9 information did not contribute to the verdict.” *State v. Allgood*, 171 Ariz. 522, 526 (App. 1992).  
10 “Once the defendant shows that the jury has received and considered extrinsic evidence,  
11 *prejudice must be presumed* and a new trial granted unless the prosecutor proves beyond a  
12 reasonable doubt that the extrinsic evidence did not taint the verdict.” *State v. Hall*, 204 Ariz.  
13 442, ¶ 16 (2003) (emphasis added).

14             The State has now ***conceded*** that the recording that it played for the jury was never  
15 admitted at trial. *See* State’s Notice of Error in Playing Of Exhibit 744 During Aggravation  
16 Hearing (Jul. 11, 2011). It is thus undisputed that the jury at the aggravation phase heard and  
17 considered extraneous evidence. The State cannot carry its burden of proving that the  
18 inflammatory audio did not influence the jury’s finding of the aggravating factor of harm to the  
19 victim’s family or of a special relationship with Liz Neuman. Prejudice must be presumed.

20             On September 14, 2011, this Court denied without written opinion Mr. Ray’s motion for  
21 new trial. In light of that ruling, the Court has not yet imposed any remedy for the State’s  
22 prejudicial error. The Court should now strike the aggravating circumstances found by the jury.  
23 To ensure orderly proceedings, the Court should make this ruling before the presentencing  
24 hearing commences. Without the jury-found aggravators, the State cannot introduce evidence of  
25 additional aggravating factors. *Cf.* A.R.S. §13-701 (C), (F).

1     **II.     ARGUMENT**

2             **A.     The State’s Introduction of Extrinsic Evidence Was Prejudicial**

3             Because the State played for the jury audio recordings of Mr. Ray that were not admitted  
4     at trial, “prejudice must be presumed and a new trial granted unless the prosecutor proves beyond  
5     a reasonable doubt that the extrinsic evidence did not taint the verdict.” *Hall*, 204 Ariz. at ¶ 16.  
6     The State cannot carry that burden here. The audio recordings of Mr. Ray’s voice were the most  
7     powerful—and prejudicial—evidence introduced by the State. Indeed, jurors have since stated  
8     publicly, on Dateline NBC, that audio recordings weighed heavily in their deliberations. *See*  
9     Dateline NBC Transcript, 10/21/11, at 61.<sup>1</sup>

10            The State’s argument that the audio was only *intended* to highlight the aggravating factor  
11     of pecuniary gain, which the jury rejected, is misplaced. *Cf.* State’s Notice of Error at 2–3.  
12     While the State may have intended to use the audio for that purpose, the State plainly cannot  
13     control the impact of the audio on the jurors, and cannot deny that the recording was  
14     inflammatory. The State thus cannot prove, and this Court cannot conclude, that the emotional  
15     and prejudicial impact of the recording did not affect the jurors’ conclusions regarding the harm  
16     to the victims’ families and Mr. Ray’s relationship of trust with Liz Neuman. In light of the taint  
17     arising from the State’s introduction of extrinsic evidence, the Court should strike these  
18     aggravating circumstances.

19  
20            <sup>1</sup> The Dateline NBC transcript contains the following:

21     “HANSEN: (Voiceover) One part of the prosecution’s case did get their attention, the audio recordings of  
22     Ray at the retreat.

23     (Polk in court; Crystal Hall)

24     Mr. RAY: (Audiotape) And I am God.

25     Juror #1: (Voiceover) Now you’re looking at a very timid, shy person there.

26     (Ray in court)

27     Juror #1: But on that tape, that forceful, that driving power, that really grabs you. And it was just  
28     opposite.”

1           **B.       Without The Tainted Aggravators, The State Is Not Permitted to Attempt to**  
2                           **Prove Additional Aggravators**

3           The tainted aggravating circumstances have Sixth Amendment ramifications, and striking  
4           them will dictate the nature of the presentencing hearing. Under *Blakely v. Washington* and its  
5           progeny, this Court cannot increase Mr. Ray's sentence beyond the "statutory maximum" unless  
6           the jury has found true at least one aggravating circumstance. See *Blakely*, 542 U.S. 296, 301  
7           (2004) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime  
8           beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a  
9           reasonable doubt." (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000))). The "'statutory  
10          maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the  
11          basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303 (emphasis  
12          omitted). In Arizona, "the maximum penalty based on the verdict alone is the presumptive  
13          sentence" set forth in A.R.S. § 13-702. *State v. Gatliff*, 209 Ariz. 362, 364 (App. 2004). Thus,  
14          where the jury has not found any aggravating circumstances, the Sixth Amendment forbids the  
15          court from imposing the maximum or aggravated terms set forth in § 13-702.

16          Arizona's statutory sentencing scheme confirms this limitation. Under § 13-701(C),  
17          "[t]he . . . maximum term imposed pursuant to § 13-702. . . may be imposed **only** if one or more  
18          of the circumstances alleged to be in aggravation of the crime are found to be true **by the trier of**  
19          **fact** beyond a reasonable doubt or are admitted by the defendant . . . ." (emphasis added)). See  
20          also *id.* §13-701(F) ("**If** the trier of fact finds at least one aggravating circumstance, the trial court  
21          may find by a preponderance of the evidence additional aggravating circumstances." (emphasis  
22          added)); *id.* §13-701(J) ("For the purposes of this section, 'trier of fact' means a jury, unless the  
23          defendant and the state waive a jury in which case the trier of fact means the court.").

24          Accordingly, if this Court strikes the tainted aggravating circumstances found by the jury  
25          at the aggravation hearing, the State cannot present any additional aggravating circumstances.  
26          The presentencing hearing should accordingly be shortened by three days, which will allow  
27          sufficient time for the Defense to present mitigation evidence and to honor the victims' request to  
28          allocute.

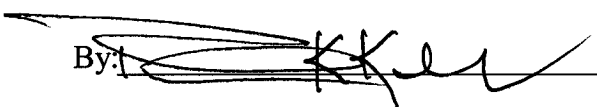
1    **III.    CONCLUSION**

2            This Court should strike the aggravating circumstances tainted by the State's prejudicial  
3 introduction of extrinsic evidence and should modify accordingly the dates and order for the  
4 presentencing hearing.

5  
6    DATED: November 3rd 2011

MUNGER, TOLLES & OLSON LLP  
BRAD D. BRIAN  
LUIS LI  
TRUC T. DO  
MIRIAM L. SEIFTER

9            THOMAS K. KELLY

10             
11           By: \_\_\_\_\_  
12           Attorneys for Defendant James Arthur Ray

13    Copy of the foregoing delivered this 3rd day  
14    of November, 2011, to:

15    Sheila Polk  
16    Yavapai County Attorney  
17    Prescott, Arizona 86301

18    by 